United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

B/S

74-1468

United States Court of Appeals

For the Second Circuit

No. 74-1468

(T-3378)

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of HAGEN PASTEWKA, Deceased and MONICA PASTEWKA, Individually,

Plaintiffs-Appellants,

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants-Appellees.

and consolidated cases.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS THOMAS I. FITZGERALD, FOR "DEATH CLAIMANTS"

HARVEY GOLDSTEIN
and
FUCHSBERG & FUCHSBERG
Attorneys for Appellants
Thomas I. Fitzgerald, as
Administrator for Estate, etc.
250 Broadway
New York, N.Y. 10007

HARVEY GOLDSTEIN
On the Brief.

CITATIONS

STATUTES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of HAGEN PASTEWKA, deceased, and MONICA PASTEWKA, individually,

Plaintiff,

-against-

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants.

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Docket No.
74-1468
(T-3378

DEATH CLAIMANT'S REPLY BRIEF

Although defendant informs that the accident occurred in the English Channel, within 12 miles of the English Coast (p. 5 of its Brief), in point of fact, it was in international waters and the law of the sea, the General Maritime Law is solely applicable. Since the forum interprets that law in cases such as this, the Court below would apply United States non-statutory and applicable statutory enactments, and if the matter is forced out to English forum, British interpretation of the General Maritime Law would prevail. As de-

fendant finally conceded (p. 38) while steadfastly pursuing an argument that the law of England should prevail because the wreck "is more akin to the navigable waters of England (a novel theory), the matter involves "the high seas or international waters...".

As to the events having occurred abroad, the events having occurred on the high seas, occurred abroad from everywhere in the entire world. That of course is the reason for applicability of the General Maritime Law.

Defendant's statement on page 29 that foreign law would govern the rights of the Death claimants is incorrect. The Death on the High Seas Act, 46 U.S.C. §761, et seq., is applicable herein; it will not be a stranger to this Court; and can be more fully and properly interpreted in the United States. There is no foreign law to govern any of the rights of any of the Death Claimants.

The Death on the High Seas Act, supra, permits recovery to a spouse, parent or children and other dependent relatives. Upon proof of dependency, an aunt, uncle, brother, sister, grandparents and cousins could join in the recovery. If this suit is driven to England, the British Lord Campbell's Act,

St. 9 and 10 Vict. 93, discussed by the Supreme Court in Sea-Land Services v. Gaudet, _____U.S._____, 39 L. Ed. 2d 9, permits an action for the benefit of the "wife, husband, parent, and child". The Death Claimants are the families of twelve deceased seamen. The dismissal of this suit in the United States and its commencement in England will destroy any cause of action by any dependent relative other than the spouse, parent or child of the dead seamen. Perhaps the Court below can explain the justice to those people. The writer cannot.

As admitted by the defendant, the cases cited by it show that dismissal under forum non conveniens generally involves the question of the applicability of foreign law and the difficulty of the United States District Court in interpreting that law. The cases are set out in defendant's Brief on page 16.

Plaintiffs herein disagree entirely with the defendant's assertion that foreign law is applicable herein and that complex problems of choice of law would arise. International General Maritime Law is involved herein. The Court below will then determine the law as interpreted by United States decisions and the applicable Death on the High Seas Act, supra. As such, there is no need for an expert on the interpretation of

foreign law.

The Death on the High Seas Act, supra, is applicable in this action through the personal representatives of the foreign deceased seamen killed due to the negligence of an American Corporation or a corporation likened to and controlled by an American Corporation. Petition of Risdal & Anderson, 291 F. Supp. 353, and The Vulcania, 32 F. Supp. 815. As stated in Risdal, supra:

> "The claimants of the decedent seaman have the same rights under both the Jones Act and the Death on the High Seas Act as they would have if their decedents were citizens of the United States, since Risdal & Anderson, Inc., is a United States corporation and the MIDNIGHT SUN was registered in the United States and flew the American flag. See Lauritzen v. Larsen, 1953, 345 U.S. 571, 585, 73 S.Ct. 921, 97 L.Ed. 1254; Gilmore and Black. The Law of Admiralty, 1957 ed. § 6-64 p. 388." (p. 356-7).

The applicability of the Death on the High Seas Act, supra, and the non-statutory General Maritime Law as interpreted by the Court below from decisional law give rise to no complex problems of choice of law as suggested by the defendant. Romero v. International Terminal, et al, 358 U.S. 354, involved an injury to a Spanish seaman aboard a Spanish ship on a voyage beginning and ending in a foreign country. Under those circumstances, the Supreme Court properly held that

United States law was not applicable. The Romero case did not involve any question of American control over the foreign ship or its corporate owner.

Fitzgerald v. Westland Marine, 369 F. 2d 499 (2CO, cited by the defendant, clearly showed that dismissals under forum non conveniens have largely been granted where foreign law was held applicable and then it would require the interpretation of that foreign law by the District Court. Fitzgerald involved alleged negligence in improperly converting a vessel from a tanker to a dry carrier in Japan and then loading the vessel negligently in Canada. This Court noted that Japanese and Canadian law would be applicable against each of the respective defendants, hence was not an abuse of discretion in dismissing the suit.

Regarding the cases cited by defendant on page 11-12 of its Brief, may we point out that they involved questions of foreign law which the United States Courts felt better belonged in a forum having access to interpretation of that law. Hatzouglou v. Asturias, 193 F. Supp. 195, involved Greek law; Scognamiglio v. Home, 246 F. Supp. 605, concerned Italian law; Domingo v. States Marine, 340 F. Supp. 811, held Philippine

law applicable; DeSairigne v. Gould, 83 F. Supp. 270, aff'd. 177 F.2d 515 (2C), determined French law was applicable. The rejection of those cases indicate the interest of justice was served when litigation occurs where the forum has knowledge of and is most familiar with the applicable law. In the case at bar, with the statutory Death Act and the non-statutory General Maritime Law involved, the Court below can interpret and apply that law. There is no issue such as existed in the above cases cited by the defendant.

Canada Malting v. Patterson, 285 U.S. 413 involved a collision on the great lakes between two Canadian ships where all of the known witnesses were Canadians and where both vessels were subject to the law of their flag. There was no "flag of convenience" vessel involved. Under those circumstances the Court believed that the case should be tried where the parties belonged. This was so although the accident occurred within the territorial waters of the United States, (not so herein, the accident occurring on the high seas). The Canada Malting case gave prime consideration to the fact that both vessels were subject to the law of Canada, that all known witnesses were Canadians and that while the vessels were technically

within the waters of the United States that was only incidental to the entirely Canadian involvement in the collision. There is no discussion of what law was applicable under the circumstances of both vessels being Canadian, the Court simply holding that if United States law was held to be applicable, it felt certain that Canadian courts would give effect to it.

On pages 4-6 of its Brief, the defendant hewes to the line of record ownership and registration of the TEXACO CARRIBEAN, seemingly ignoring the many decisions of Appellate Courts, including this Court, throughout the land reaching behind the facade of foreign ownership when, in turn, owned or controlled by United States interests. Since Texaco Panama, Inc., and TOT (Texaco Overseas Tankship Limited) were both wholly owned subsidiaries of Texaco with its base of operation in New York City, there should have been a realization by the Court below that where the defendant's base of power rested, where the failure to act with respect to the marking of the sunken hull originated was the basic issue in this suit. To say that Texaco had no proprietary interest in the TEXACO CARRIBEAN is simply wishful thinking not borne out by the realities of parental control over the subsidiary corporate owner and the prevailing law, all

disclosed in Death Claimants Brief, pages 5-12. In that regard whether TOT had the necessary authority to handle the matter is one of the basic issues in this case. It is the plaintiffs' position that it did not have such authority and that such lack, was in fact, the prime reason for asking Texaco/New York for advice, the absence of which led directly to the sinking of the BRANDENBURG because of Texaco/New York's failure to make any decision before the many hours that passed between the two collisions. Defendant still forwards the argument that this suit involves foreigner against foreigner. It does not and it never has. It is a concept that the defendant has sought to underplay and that the Magistrate and Court below seemingly did not grasp. It is the argument that Texaco in New York was and is the center of a worldwide business enterprise and that subsidiary TOT requested and did not get an answer from the New York office concerning the marking of the sunken hull. It was that responsibility that could only be answered from the New York office that creates the liability against Texaco as the true wrongdoer in this lawsuit.

That would appear to be more than sufficient reason to bring the suit in the Court below. Defendant's remark that

United States attorneys are the sole ground for commencement here is not worthy of an answer.

The Defendant suggests that the commencement of suits in England by the BRANDENBURG owners and shippers against the owners of the TEXACO CARIBBEAN and the PARACAS and against Trinity House and claims by the owners and shippers of the TEXACO CARIBBEAN and the PARACAS against each other is duplication and should be ground for dismissal herein.

No actions by the Death Claimants have been commenced in England (suit in Delaware was filed to protect against the Statute of Limitations and is inactive).

The Court below was so advised and was further informed that the suits in England by the owners and cargo shippers of the BRANDENBURG were filed only to toll the Statute of Limitations, (158a, 276a), and they have not been actively prosecuted.

The writer does not know the posture of the suits by the PARACAS and TEXACO CARIBBEAN owners and shippers against each other. The fault of either is immaterial to this suit against the owners of TEXACO CARIBBEAN predicated solely upon the intervening acts of the true owner in New York in failing

to act to have the submerged hull section marked for 27 hours after the original collision.

Defendants suit or cross-claim against Trinity House, whether active or inactive, is of little consequence here since recovery is limited to some $80,000.00, a miniscule amount in relation to the $25 Million in damage claims herein.

Understanding that this suit is predicated solely upon Texaco's failure to mark its sunken hull, a fortiori, questions of fault in causing the original collision between the TEXACO CARIBBEAN and PARACAS are immaterial as are the cross-suits between owners and shippers of those two vessels.

On page 15 of its brief, defendant, characterizes Trinity House as an indispensible party. Why it is indispensible was not set forth. It does not appear to be.

The analysis of The Douglas, 7 P.D. 151, and The Utopia, A.C. 492, by the defendant are not correct. The decisions clearly show that upon notification by the shipowner to the governmental agency, the shipowner's responsibility was ended. The British Court held that the owner was required to take all reasonable steps prior to notification and is in fact similar to United States law in that respect. Prior to notification

he has the duty to protect other vessels and will be held liable for his negligence in carrying out that duty. The difference in the British law and the United States law involves shipowners responsibility after notification to the governmental agency. It is the claim of the plaintiffs herein that after the notice was given to Trinity House, that under United States law the shipowner retains responsibility whereas under English law, it is relieved of that responsibility by the mere notification to Trinity House. That is so whether the failure to mark by Trinity is either one of comission or omission. This matter involves an act of omission with Trinity House having failed to locate the hull, with Texaco knowing that it did not locate it many hours before the BRANDENBURG collided with the hull, also failing to do anything. Under that circumstance the law of the United States and of England are very different, since under United States law, the shipowner cannot abrogate its non-delegable duty to mark.

Berwind-White v. Pitney, 187 F. 2d 665 (2C), the distinction between marking by the Coast Guard and failure to mark was clearly spelled out. The exceptions being that the owner cannot interfere with the manner in which the Coast Guard marks.

"It is a matter of public policy reflected in the statute to place the responsibility for marking the wreck squarely upon the owner alone. The R. J. Moran, 2 Cir., 299 F. 500, 503. This appellant, who was the owner, did nothing in that regard although as early...

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[3.4] Nor do the unsuccessful efforts of the Coast Guard to locate and mark the wreck affect this liability. It has long been the law that an owner may comply with the statutory requirement for marking by getting the Lighthouse Department (now the Coast Guard) to do it; when the Coast Guard does mark the wreck, whether properly or not, the owner is relieved of any statutory duty in that respect... The basis of this exception to the otherwise non-delegable duty is the fact that the private owner cannot interfere with the manner in which the government agency uses its discretion in the manner of marking...Although the Coast Guard's search for the wreck may, if made with due diligence in the light of the facts within the knowledge of the owner, operate to discharge the owner's duty, the mere fact that the Coast Guard undertakes a search does not relieve the owner of liability for failure to make all reasonable efforts to mark."

Thus, the distinction in responsibility <u>after</u> notification is specifically the fact pattern that occurred herein. While under English law the owner is free from all responsibility whether of omission or comission after notification, under the United States decisional law the owner is not free after notification except for the manner of Coast Guard marking.

In the case at bar, the record is clear that Trinity House failed to mark the sunken hull with which the BRANDENBURG collided as shown on page 37 of Defendant's Brief, the Magistrate failed to distinguish the activities of Trinity House in simply mooring for the evening at what it thought it was the general vicinity of the sunken hulls, with no actual marking of the hulls. In point of fact, The Siren, the Trinity House Vessel, did not even locate the section of the hull involved in the collision with the BRADENBURG, much less mark it. That is clear from The Siren's own records. The Magistrate in "Accepting the factual version of the defendants" suggested that there was a marking by The Siren and the under those circumstances there would be no difference between the English law and the United States law. Not only was the Magistrate in error in his concept of the facts, he was in error in his concept of the law (since even if there was a marking the owner has the duty to continue to take all reasonable steps) and under any circumstances should not have made any decision in this motion for dismissal under forum non conveniens on an open issue to be determined by testimony and documents at a later date.

It would seem reasonable that the plaintiffs version of the facts should be viewed in the most favorable light in this motion to dismiss. However, even if not, certainly the defendant's factual position should not be accepted on face value by way of attorney's affidavits in a motion calculated to erase a claim of this nature.

On page 22-25 of its Brief, defendant discusses the question of adequacy of pre-trial discovery permitted. The 29 Interrogatories served by the plaintiffs are set forth on pages 123a - 131a. It is the plaintiffs belief that all or substantially all of the interrogatories are concerned in some degree with the question of forum non conveniens, in attempting to elicit information regarding the location of witnesses, the location of documents, the nature of the operation and authority and control over the entire business combine under the name Texaco from New York.

Magistrate Jacobs comments, p. 161a-167a, and in part quoted by defendant on pages 24-25 of its Brief, clearly limit the discovery far in excess of what it should have in a suit of this nature. In discussing interrogatory #15, which was not permitted, the Magistrate could not understand that the plain-

tiffs were attempting to elicit the information which the Magistrate should have had in order to determine the extent of witnesses and testimony to be obtained from England. It was in that vein of improperly narrowing the information to be obtained that only six of the 29 interrogatories were permitted and even as to those six, in eviscerated form. The Court can readily understand that without the possibility of examining the defendant officers in New York by deposition nothing could be obtained that would in any way answer the fundamental question of where the power to act to mark the hull rested. The interrogatories permitted are set forth on page 165a-166a and is the sum total of all interrogatories that the Magistrate required the defendant to answer. No depositions were allowed. No admissions were permitted.

It is indeed apparent that the information obtained from the answers to the six interrogatories could not present a full blown picture or understanding of the importance of testimony, witnesses, documents to show that New York was in fact the seat of power. The Magistrate either didn't understand or didn't believe, or perhaps a combination of both. He heard that there were witnesses in England; he knew that the accident

occurred in the English Channel; and he went no further. And more importantly, he would not permit the plaintiffs to go further and that is why $20 Million in claims by 14 claimants suing an American defendant based in New York with twelve claimants under the United States statutory Death Act have been exiled to England.

That relative term "abuse of discretion", whatever its precise meaning is apparent herein.

In Langnes v. Green, 282 U.S. 531, "discretion" was defined as follows:

> "The term 'discretion' denotes the absence of a hard and fast rule. The Styria v. Morgan, 186 U.S. 1, 9, 22 S.Ct. 731, 45 L.Ed. 1027. When invoked as a guide to judicial action, it means a sound discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

And so, that "bold relief" with which the English witnesses "stand out" is based upon no facts, no identification of any of the witnesses, no understanding of what any of those possible witnesses will testify to, and in fact is incorrectly presumed merely from the collision site, all information to establish the importance of witnesses in the New York area

having been smothered by the decision to skeletonize the interrogatories and to reject depositions and admissions.

The Court below did not have before it sufficient information to drive this suit from the Courthouse. The defendant has admitted on page 22 of its Brief that the Court did not have the names of witnesses or a summary of their intended testimony. In point of fact, the Court below does not know at this time nor does this Court know from a reading of the record just how many necessary witnesses reside in England. Since we now know at this time that English law is not applicable and we do not know how much activity would actually be necessary to obtain the deposition of the English witnesses (whether one, two or more) on what basis did the Court below deprive the plaintiffs from the affect of the Death on the High Seas Act against the United States, New York based, corporation? Depositions are customary in Admiralty matters, Lykes v. Sugarman, 272 F.2d 679 (2C); M/S Bremen, 407 U.S. 19, and would not be any grave hardship here.

Defendants statement on page 28 of its Brief that plaintiffs never asked for the list of witnesses or their testimony is not true. The Court will note that the interrogatories on

123a - 127a not permitted, fully explore the subject. The defendants' objection was allowed by the Magistrate.

When it is understood that nobody has told us at this time who the relevant and important witnesses are, where they can be located and of which country they are citizens; further that the litigation pending in England concerning the collision of the BRADENBURG with the hull of the TEXACO CARIBBEAN was commenced only to toll the Statute of Limitations, the Court can readily understand that it was and is the plaintiffs' position that New York is the proper and in fact the only forum against the New York based defendants in which defendant's personnel can be deposed or subpoenaed, will open its records and fully investigate the intra-corporate dealings involved herein. The question of what evidence will be available to present a prima facie case, the material witnesses, their availability and availability of supporting documents is not answered although the Magistrate identified them as employees and personnel of TOT and of Trinity. That conclusion, not based upon any facts since the defendant did not identify the witnesses, never explained the "vital" importance of each has created an aura of English availability that cannot be

substantiated by anything in the record. The Court will note that in Point III of the Death Claimant's Brief, pages 21-26, the writer requested that the defendant show to this Court some indication of names of witnesses, who might have seen or know something, their availability for trial, substance of their testimony and willingness to appear. Again, the defendant, as it did in the District Court, failed to provide any measure of identification. At this late date, we are still in the dark as to the proof that will be forthcoming on trial and where the witnesses who will tender that testimony are located.

On the other hand, the position of the plaintiffs is that there are material witnesses in and about the New York City area. Officials who are employed in high positions with Texaco in New York; persons who can and should resolve the question of domination and control by the New York office and responsibility for the marking of the TEXACO CARIBBEAN. The access to that proof is simple in New York. It is well nigh impossible in England.

On page 8-9 of defendant's Brief, defendant seems to suggest that this suit was transported to New York for improper

reasons when the fact is that Texaco's entire base of operation is in New York with dominated wholly owned subsidiary offices scattered about the globe. It seems clear in reading even the short paragraphs of the Magistrate's decision, quoted by defendant that the Magistrate made numerous findings of fact forgetting that the crew of the LESLIE LYKES were United States seamen; available in the United States, that he could not identify persons or testimony from TOT or Trinity other than to identify them as employees and personnel whose testimony will be vital (how or why is unknown), that the main issue of control by Texaco/New York was decided by the Magistrate on affidavit, "their action viewed as a whole seems to have little if any contact with New York...after specifically refusing to permit the plaintiffs any opportunity to take depositions, propound interrogatories on the question of activity of Texaco/New York officials with respect to authority, or have any relevant discovery.

The very paragraphs quoted by defendant pinpoint the inexcusable failure of the Court below to provide the plaintiffs a reasonable opportunity to show this court why this lawsuit belongs in New York, above all places. The question

of liability of Texaco, likened to the owner of the TEXACO CARIBBEAN, is narrowed to the simple question of whether Texaco because of the negligence of its New York office, is responsible for its failure to mark the hull of the TEXACO CARIBBEAN. Under the circumstances the appropriateness of the District Court in New York as a forum to adjudicate the rights of the parties herein should not be challenged. The Court below based its determination upon some unsubstantiated statements by defendant's attorneys that defendants and Trinity personnel, albeit unknown, were all important and vital to the defense and that the action seemed to have little, if any, contact with New York. Witnesses that plaintiff sought to examine in and about the New York area as well as the crew of the LESLIE LYKES, an American ship involved in the rescue operation herein, were, considered unimportant.

Plaintiffs respectfully submit that the Court below clearly abused its discretion.

CONCLUSION

For the above reasons, the dismissal should be reversed so that this properly jurisdictioned suit can go forward on its merits.

Respectfully submitted,

HARVEY GOLDSTEIN and
FUCHSBERG & FUCHSBERG
Attorneys for the Death
Claimants
250 Broadway
New York, New York 10007

HARVEY GOLDSTEIN
On The Brief

SERVICE OF THREE (3) COPIES OF THE WITHIN

Brief IS HEREBY ADMITTED

THIS 10 DAY OF October 1974

Pelis Turbin Patterson & Stratoche

Attorney(s) for appeals

Haight, Gardner, Poor & Havens

Attorney for Plaintiffs - Appellant

"Brandenburg"